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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No.

THE HONORABLE RICHARD S. RODNEY, UNITED STATES DISTRICT JUDGE, I. B. ADELMAN, and TIVOLI REALTY, INC.,
Petitioners,

v.

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., WARNER BROS. PICTURES, INC., WARNER BROS. PICTURES DISTRIBUTING CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, COLUMBIA PICTURES CORPORATION, UNITED ARTISTS CORPORATION, UNIVERSAL PICTURES COMPANY, INC., UNIVERSAL FILM EXCHANGES, INC., INTERSTATE CIRCUIT, INC. and TEXAS CONSOLIDATED THEATRES, INC.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT.

To the Honorable, The Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Tivoli Realty, Inc., and I. B. Adelman, intervenors in the court below, respectfully petition that a writ of certi-

orari be issued to review the judgment in the Court of Appeals for the Third Circuit on four petitions for mandamus, on the basis of which that court issued preemptory writs against the Honorable Richard S. Rodney, United States District Judge for the District of Delaware.

The Honorable Richard S. Rodney, United States District Judge, who entered the orders against which the writs were issued, joins in this petition. The petitioner, Judge Rodney, took no part in the preparation of this petition and expresses no views as to its contents, but joins in the petition from a desire to see a most important and controverted question authoritatively settled. The sole grounds on which the petitioner, Judge Rodney, relies are set forth in his judicial opinion filed in this case (R. 68).

OPINIONS BELOW.

The opinion of the District Court denying the motion to transfer is reported at 89 F. Supp. 278. The opinion of the Court of Appeals granting four preemptory writs of mandamus against the petitioner, Judge Rodney, (R. 201) has not as yet been reported.

JURISDICTION.

The mandamus petitions arose out of two separate suits for treble damages and injunctive relief brought under the federal antitrust laws, one by Tivoli Realty, Inc., intervenor, and the other by I. B. Adelman, intervenor. (R. 7, 82). These two suits were filed in the United States District Court for the District of Delaware.

The defendants in each suit were the eight major corporate distributors and producers of motion pictures and their parent companies, together with two circuit motion picture distributors operating in the State of Texas, Interstate Circuit, Inc. and Texas Consolidated Theatres, Inc., both of which are Delaware corporations.

In each of these suits the various defendants moved Petitioner Judge Rodney to transfer the case to the Northern District of Texas on the ground of forum non conveniens pursuant to Section 1404(a) of the Judicial Code. (R. 26). In deciding these motions, Petitioner Judge Rodney found that in each case venue was improperly laid in Texas as to five of the defendants. He further found that venue was proper in Delaware as to all of the defendants. On the basis of these findings, he held that Texas was not a district in which either action "might have been brought" within the meaning of Section 1404(a). For this reason, he held that the District Court did not have the power to transfer the cases to Texas and denied the motions (R. 75).

In each suit the eight distributors and producers of motion pictures and their parent companies brought petitions for a writ of mandamus in the Court of Appeals for the Third Circuit on March 31, 1950. (R. 1, 76). The two Texas circuit motion picture distributors, Interstate Circuit, Inc. and Texas Consolidated Theatres, Inc., brought separate petitions for a writ of mandamus in each suit in the same Court. (R. 109, 167). Petitioners, Tivoli Realty, Inc., and I. B. Adelman, were permitted to intervene in each of the four suits. (R. 179). These four cases were consolidated and the writs of mandamus directing petitioner, Judge Rodney, to consider the motions to transfer on their merits were issued on December 21, 1950. (R. 216, 219, 221, 223). Jurisdiction of this Honorable Court is evoked under 28 U.S. C., Section 1254, subdivision 1.

STATEMENT OF THE CASE.

In November 1947, Petitioner Tivoli Realty, Inc., brought suit in the United States District Court for the District of Delaware for treble damages and injunctive relief against the following named defendants:

Paramount Pictures, Inc.
Paramount Film Distributing Corporation
Loew's Incorporated

Radio-Keith-Orpheum Corporation
RKO Radio Pictures, Inc.
Warner Bros. Pictures, Inc.
Warner Bros. Pictures Distributing Corporation
Twentieth Century-Fox Film Corporation
Columbia Pictures Corporation
United Artists Corporation
Universal Pictures Company, Inc.
Universal Film Exchanges, Inc.
Interstate Circuit, Inc.
Texas Consolidated Theatres, Inc. (R. 7).

Of these defendants, the following five, Paramount Pictures, Inc., Radio-Keith-Orpheum Corporation, Warner Bros. Pictures, Inc., Twentieth Century-Fox Film Corporation, and Universal Pictures Company, Inc., were not inhabitants of, nor are they found, nor do they transact business in Texas. For that reason Delaware was the only district in which venue against all of the defendants could be properly laid pursuant to the antitrust statutes which provide that suit may be brought against a corporation

> "not only in judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business . . ." (15 U.S.C.A. §22).

Thereupon on December 8, 1947 [which was prior to the effective date of Section 1404(a) permitting transfer of cases], the two defendant Delaware corporations operating in Texas (Interstate Circuit, Inc. and Texas Consolidated Theatres, Inc.) brought suit in the District Court in the Northern District of Texas to enjoin Petitioner Tivoli from continuing the Delaware action on the ground of forum non conveniens. (This suit will be hereinafter referred to as the Texas action.)

On December 26, 1947, the five defendants who were neither found nor transacted business in Texas, filed in the Texas action an agreement to submit to the venue of the Texas court. In connection with this agreement the five

stated that they were "not subject to the venue of a Federal District Court or any Court in Texas."

On December 29, 1947, the District Court for the Northern District of Texas enjoined Petitioner Tivoli from prosecuting this case in Delaware.

On April 8, 1948, the Court of Appeals for the Fifth Circuit reversed the District Court in Texas, dissolved the injunction and dismissed the action. The Court of Appeals opinion appears at 167 F. 2d 155. Certiorari was denied by this Court. 334 U.S. 837 (1948)

The opinion of the Court of Appeals in the Texas case rested on four grounds:

1. Since at least five of the defendants were not subject to the venue of the Texas Court, and Delaware was the only forum where venue as to all of the defendants was proper, the doctrine of *forum non conveniens* could not come into play because alternative forums had not been open to plaintiff (167 F. 2d at 156-7);

2. *Trial in Delaware would be more convenient to the parties than trial in Texas* (167 F. 2d at 157);

3. As a matter of comity, the Texas Court could not enjoin prosecution of an action in a sister court (167 F. 2d at 156);

4. The plaintiff's choice of forum (prior to the enactment of the new judicial code) *in an antitrust suit* was not subject to the doctrine of *forum non conveniens.* (167 F. 2d at 157-8)

After the injunction was dissolved, Petitioner I. B. Adelman brought suit in the District of Delaware in March, 1948, under the antitrust laws for treble damages and injunctive relief against the same defendants named in the suit brought by Tivoli Realty, Inc.

On the first day of September 1948, Section 1404(a) became effective which reads as follows:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any

civil action to any other district or division where it might have been brought." (28 U. S. C. § 1404(a)).

On the 6th day of January 1949, identical motions were filed in each of these two suits to transfer the cases to the Northern District of Texas under the above section. (R. 62). The District Court held that it had no power to do so because in each suit five of the defendants were neither inhabitants of, nor were they found, nor did they transact business in Texas. For that reason Texas was not a proper venue and the suits could not have originally been brought there within the meaning of Section 1404(a). The Court of Appeals for the Third Circuit Court ordered the vacation of the order of the District Court holding in effect that suit may be transferred to a District which was not a proper venue provided that defendants entered into an agreement with the Court not to raise the question.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The Court of Appeals treated as immaterial the finding of the District Court that five defendants were not inhabitants of Texas, could not be found, and did not transact business there. It construed Section 1404(a) to mean that the District Court had discretionary power to transfer a case to any District in the United States if the defendants agreed to waive the question of venue. It further held that the exercise of that power was not subject to review.

The Court observed:

> "The difference between the phrase 'might have been brought' of Section 1404(a) and that employed in this opinion, 'could now be brought', is no more than one of tense and grammar, the imperfect subjunctive as compared to the pluperfect subjunctive. Surely Congress did not intend the effect of an important remedial statute to turn upon tense or a rule of grammar." (R. 205).

The Court of Appeals concluded that mandamus would lie in this case because "the Delaware District Court has refused to exercise its authority to determine issues of justice and convenience raised by Section 1404(a) when it is its duty to do so." (R. 208).

The dissenting opinion of two judges pointed out that the meaning of Section 1404(a) should be determined by looking at the venue statutes by which Congress designated the proper place of litigation. The dissenting judges observed:

> "Logically, the district where an action *in personam* 'might have been brought' can mean a place of proper venue for the original proceeding, or a place where the defendant was amenable to the authority of the court, or both. We are unable to find any other reasonable construction which would give the language substantial effect. The phrase under construction is treated as surplusage unless it is given one of the above suggested meanings. Apparently, the court believes that problem can be avoided here by reasoning that, even if venue does not lie in Texas, all of the defendants were amenable to the authority of the District Court there. We think that conclusion is mistaken." (R. 209-10).

QUESTIONS PRESENTED.

1. Where plaintiff brings a suit in a district designated by Congress as a proper venue, may the court transfer it to an improper venue provided the defendant agrees to enter his appearance and waive objection to the improper venue?

2. May the Court transfer a case to a Distrct where some of the defendants were not amenable to process provided that such defendants agree to submit themselves to the jurisdiction of the transferee District?

3. Whether the decision of the United States Court of Appeals for the Fifth Circuit holding that Delaware is and Texas is not the convenient forum for this action, may be disregarded and the issue considered *de novo* by the District Court in Delaware.

This question, which relates only to the Tivoli Realty Company proceeding, was argued in the District Court and also in the Court of Appeals. It was not discussed in the opinion below.

SPECIFICATIONS OF ERROR.

1. The Court below erred in ordering Petitioner Judge Rodney to consider whether a district which it had found to be an improper venue was, nevertheless, a more convenient forum.

2. The court below erred in stating that there was no question of respondents amenability to process in Texas.

3. The court below erred in ruling on Petitions 10,174 and 10,176 (the Tivoli Realty Company case) in such a way as to direct the District Court independently to consider questions of fact already adjudicated by the Fifth Circuit Court of Appeals.

4. The court below erred in overruling intervenors' motions to dismiss the petitions for mandamus.

REASONS FOR GRANTING WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF PETITION.

We think it is of paramount importance to orderly federal procedure that the present confusion in the interpretation of Section 1404(a) and the statutes relating to venue be settled by the authority of this Court. We have collected the reported cases, which we set out in Appendix A. All of the District Court cases except two, one unreported, hold either directly or by implication that a case may not be transferred to a venue which was improper at the time the suit was brought. These are *Ferguson* v. *Ford Motor Co.*, 89 F. Supp. 45 (S. D. N. Y. 1950) and *Shore Amusements* v. *Paramount Pictures, et al.*, Civil No. 1120-47, D. D. C., June 15, 1949. The theory of these cases is that Section 1404(a) must be interpreted in the light of the venue stat-

utes and that a forum designated by Congress as an improper venue is not one to which the case can be transferred.

The Court of Appeals for the Second Circuit in the case of *Foster-Milburn Co.* v. *Knight,* 181 F. 2d 949, (1950), holds that a suit may not be transferred pursuant to Section 1404(a) on motion of the plaintiff to a district in which the plaintiff could not have originally made valid service on the defendant. The Court below attempted to distinguish that case because jurisdiction there was founded on diversity of citizenship. But we believe it is in direct conflict with the opinion below. In attempting the distinction, the Court below stated "no problem of service of process is presented in connection with private civil antitrust suits for Section 12 of the Clayton Act, as we have indicated, authorizes service wherever a defendant may be found." (R. 206). But Section 12 of the Clayton Act does not support any such conclusion, as is clear from its text.

> "*District in which to sue corporation.*
>
> "That any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found." (15 U. S. C. A. §22)

As the dissenting opinion points out, this section means that service of process outside the district can only be made if the corporation served transacts business in the district.

Moreover, the fact that the opinion below and the opinion of the Second Circuit in *Foster-Milburn Co.,* v. *Knight, supra,* are in direct conflict, is sharply revealed in the Second Circuit's opinion, where Judge Hand said:

> "The same conclusion was expressed obiter in *Christopher* v. *American News Company,* and Judge Rodney so decided in *Tivoli Realty Insurance Company* (sic) v. *Paramount Pictures,* D. C., 89 F. Supp. 278." (181 F. 2d at 952).

In other words, the Second Circuit has expressly approved the decision which the Third Circuit has reversed.

A second conflict arises out of the decision of *Shapiro* v. *Bonanza Hotel Company*, decided December 14, 1950, 19 L. W. 2299, by the Court of Appeals for the Ninth Circuit (as yet unreported) in which the Court agrees with the opinion of the Second Circuit in *Foster-Milburn Co.* v. *Knight, supra.*

A third conflict exists between the decision below and that of the Fifth Circuit in *Tivoli Realty, Inc.* v. *Interstate Circuit, Inc.*, 167 F. 2d 155 (1948), *cert. den.* 334 U. S. 837 (1948) (the so-called Texas action). It is true that the Fifth Circuit opinion was written prior to the effective date of Section 1404(a). Nevertheless the court in that case clearly defines the doctrine of *forum non conveniens* which Section 1404(a) is intended to implement but not change. In the *Tivoli* case, the court makes it clear that there must be two alternative forums in which proper venue could have been obtained, before *forum non conveniens* can be invoked. The Court says:

> "At least two such forums must be open to the plaintiff before the doctrine comes into play; and they shall not be dependent merely upon the will or grace of the defendant, but must be provided by law." (167 F. 2d at 156-7)

In addition, this Honorable Court, in *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501 (1947), clearly indicated the necessity of two independent forums in order to invoke *forum non conveniens*. We, therefore, submit that the decision of the court below was inconsistent with what we think is the meaning of the *Gulf* opinion.[1]

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[1] The Ninth Circuit case of *Gusti* v. *Pyrotechnic Industries*, 156 F. (2d) 351 (1946), does not discuss § 1404(a). According to that decision, a mere allegation in an antitrust complaint is sufficient without preliminary proof to establish venue in any state where the conspiracy is alleged to have occurred. We think that the court below properly ignored this case as an extreme and unwarranted extension of the law of venue. Under that rule, facts showing venue could not be proved until after trial on the merits had been completed. The decision further reflects an extreme confusion now existing with respect to venue in antitrust suits.

Under the existing confusion, there is judicial support for all the following conflicting theories as to the interpretation of Section 1404(a):

1. Some cases construe the phrase in Section 1404(a) "where it might have been brought" to mean that a case cannot be transferred to a district in which defendants are not amenable to process even though the venue is proper. *Magnetic Engineering & Mfg. Co.* v. *Dings Mfg. Co.*, 178 F. 2d 866 (2nd Cir. 1950).

2. Some cases hold that a case cannot be transferred to an improper venue under the meaning of Section 1404(a), *Hampton Theatres, Inc.* v. *Paramount Film Distributing Corp.*, 90 F. Supp. 645 (D.D.C. 1950); *Masterpiece Productions, Inc.* v. *United Artists Corp.*, 90 F. Supp. 750, aff'd on reargument 94 F. Supp. 116 (E.D.Pa., 1950); *U. S.* v. *91 Packages*, (D. N.J. 1950), 19 LW 2203.[2]

3. One case permits transfer to a venue which is not proper as to *all* the defendants if *one* of them is subject to venue in the transferee district and the *others* agree to waive objection. *Ferguson* v. *Ford Motor Co.*, 89 F. Supp. 45 (S.D. N.Y. 1950).

4. The opinion below represents the extreme view that a suit in any district may be transferred to any other district under the doctrine of *forum non conveniens*, regardless of venue or amenability to process, provided that the defendants enter into an agreement with the transferring

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[2] *In re Lustron Corp.*, 184 F. 2d 789 (7th Cir., 1950) is to be distinguished from this general category because it involved special consideration of the Bankruptcy Act. It is, however, directly in conflict with the case at bar in that the holding severely limits the broad application of Section 1404(a) urged by the Third Circuit.

In the *Lustron* case, there was a motion to transfer a bankruptcy proceeding from the Northern District of Illinois to the Southern District of Ohio. The court limited the application of Section 1404(a) by the language of the Bankruptcy Act (11 U. S. C. A. §11, sub-section a[19]) which provides that bankruptcy cases may be transferred to "other courts of bankruptcy." Since no such proceeding was pending in the Ohio court, the Circuit Court held that the court had no power under Section 1404(a) to transfer the proceeding.

court that they will not raise the objection in the transferee court.[3]

An example of the resulting confusion in the absence of controlling authority as to the district to which a suit may be transferred under Section 1404(a) is found in *U. S.* v. *23 Gross Jars,* 86 F. Supp., 824 (N.D. Ohio, 1949). Suit was brought in the Western District of Pennsylvania. That court transferred the case to the Northern District of Ohio, which reviewed the decision of the Western District of Pennsylvania, and remanded the case back to its original starting place on the ground that venue in the Northern District of Ohio would not have been proper.

Still further confusion now exists because of the absence of controlling authority as to whether the Federal Court in one district is bound by a prior decision of another Federal Court on the issue of which is a convenient forum. It might be supposed that the court first deciding the issue of fact would control and that at least this issue could not be re-argued before another court. The decision in this case, however, throws grave doubt on that conclusion. In the *Tivoli* case, the defendants presented the precise issue of convenience to the Court in Texas. The Circuit Court of Appeals reviewed the evidence and held that Delaware was the convenient forum. The opinion of the Court of Appeals directs the Delaware Court to reexamine an issue of fact already decided in Texas. This point was argued before the District Court and before the Court of Appeals, but the opinion below did not discuss it.

It is submitted that under the conflicting decisions and dicta which are at present the "law" of *forum non conveniens,* no plaintiff in a federal court can know with any certainty where to bring a suit or what will happen when it is brought. It can be judicially recognized that delay operates to the advantage of defendants and harassment of plaintiffs. Ordinarily any forum chosen by the plaintiff

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[3] The cases which have considered the meaning of Section 1404(a) are set out in Appendix A.

will be objected to by defendants. The opportunities for delay under the present confusion are illustrated by the case at bar. Petitioner Tivoli Realty, Inc., in November 1947 brought its action in the only feasible district. One court has already held that this forum was the most convenient. Yet for over three years it has been struggling at great expense to get to trial. The fact that the matter has once been adjudicated in a case which went up to this Court on a petition for certiorari has been of no avail. If the case is sent back on the issue of convenience, the question whether the finding of the Texas court can be disregarded will still have to be adjudicated. Unless Petitioner Tivoli Realty, Inc., decides to surrender and undergo what it believes to be a tremendous and unjust hardship in trying the suit in Texas, another mandamus may have to be brought to decide the validity of the finding by the Fifth Circuit Court of Appeals. The matter may still be undecided a year from now if the District Court in Delaware holds contrary to the Court of Appeals in Texas. This Court may take judicial knowledge that this kind of situation is being repeated. We earnestly urge that these procedural rules vital to plaintiffs in federal court be clarified by decision of this court.

If the rule is to be that an improper venue may, in spite of the venue statutes, be ordered the place of trial on the ground of convenience, plaintiff should be permitted to choose that forum at the outset. Under the rule of the court below, defendant is given the choice of remaining in an allegedly inconvenient forum or moving the case to a District where the plaintiff could not have brought it. Nothing in the legislative history of Section 1404(a) justifies an interpretation which subjects plaintiffs to this kind of handicap.

CONCLUSION.

The Petitioners respectfully urge that this Court issue the writ of certiorari prayed for for the reasons given above.

Respectfully submbitted,

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APPENDIX A.

The following are the reported cases, not discussed above, in which transfer under Section 1404(a) has been considered:

1. Supreme Court Cases.

All of these cases upheld the propriety of a motion to transfer under Section 1404(a). In all of them venue in the transferee district would have been proper.

Ex Parte Collett, 337 U.S. 55 (1949).
Kilpatrick v. *Texas & P. Ry. Co.*, 337 U.S. 75 (1949).
United States v. *National City Lines, Inc., et al.*, 337 U.S. 78 (1949).

2. Circuit Court Cases.

In the following cases, appeals from orders transferring the cases were dismissed as non-appealable. In both cases, a finding appears demonstrating that venue in the transferee district would have been proper.

Magnetic Engineering & Mfg. Co. v. *Dings Mfg. Co.*, 178 F. 2d 866 (2nd Cir., 1950).
Jiffy Lubricator Co. v. *Stewart-Warner Corporation*, 177 F. 2d 360 (4th Cir., 1949).

Christopher v. *American News Co.*, 176 F. 2d 11 (7th Cir., 1949 sustained a transfer to the Southern District of New York after making a specific finding that venue would have been proper in that district.

Atlantic Coastline R.R. Co. v. *Davis*, 5th Cir. 1950, 19 LW 2215, reversed a District Court order of transfer entered following two mistrials. Venue in the transferee district would have been proper.

The following cases were remanded with the directive that the district court consider the propriety of a motion to transfer. In all of them it appears that venue would have been proper in a suggested transferee district.

Seven Oaks v. *Federal Housing Administration*, 171 F. 2d 947 (4th Cir., 1948)

Burges v. *Proctor & Gamble Defense Corp.*, 172 F. 2d 541 (5th Cir., 1949)
Amalgamated Ass'n Etc. v. *Southern Bus Lines*, 172 F. 2d 946 (5th Cir., 1949)
Hammett v. *Warner Bros. Pictures*, 176 F. 2d 145 (2nd Cir., 1949)
Schoen v. *Mountain Producers Corp., et al.*, 170 F. 2d 707 (3rd Cir., 1948)

Three additional Circuit Court cases discuss Section 1404(a) but are not in point:

Ford Motor Co. v. *Ryan*, 182 F. 2d 329 (2nd Cir., 1950) sustained that part of Judge Ryan's opinion in *Ferguson* v. *Ford Motor Co.*, 89 F. Supp. 45 (S.D. N.Y. 1950), refusing a transfer on the merits. It did not discuss the propriety of transfer to an improper venue.
Larsen v. *Nordbye*, 181 F. 2d 765 (8th Cir., 1950)
New York, C. & St. L.R.Co. v. *Vardaman*, 181 F. 2d 769 (8th Cir., 1950)

3. District Court Cases.

A great many of these cases arise from suits brought under the Federal Employers Liability Act (45 U.S.C.A. Sec. 51 et seq.). In the following cases, the motions were granted. Venue in the transferee district was found proper in all of them.

Hayes v. *Chicago, R. I. & P. R. Co.*, 79 F. Supp. 821 (D. Minn. 1948)
Nunn v. *Chicago, Milwaukee, St. P. & P. R. Co.*, 80 F. Supp. 745 (S.D.N.Y. 1948)
Chaffin v. *Chesapeake & O. Ry. Co.*, 80 F. Supp. 957 (E.D.N.Y. 1948)
Richer v. *Chicago R. I. & P. R. Co.*, 80 F. Supp. 971 (E.D. Mo. 1948)
Republique Francaise v. *M. K. & T. Ry. Co. of Texas*, 85 F. Supp. 295 (N.D. Texas, 1949)
Scott v. *New York Cent. Ry. Co.*, 81 F. Supp. 815 (N.D. Ill. 1948)
Conley v. *Pennsylvania R. Co.*, 87 F. Supp. 980 (S.D. N.Y. 1950)

Maloney v. *New York, N. H. and H. R. Co.*, 88 F. Supp. 568 (S.D. N.Y. 1949)
Huff v. *Nashville, Chattanooga & St. Louis Ry.*, 88 F. Supp. 735 (S.D.N.Y. 1949)
Spence v. *Norfolk & W. Ry. Co.*, 89 F. Supp. 823 (N.D. Ohio, 1950)
Hawks v. *Md. and Pa. R. Co.*, 90 F. Supp. 284 (E.D. Pa. 1950)
Mazula v. *Delaware & Hudson R. Corp.*, 90 F. Supp. 966 (S.D. N.Y. 1950)
Stewart v. *Atchison, Topeka & S. F. Ry. Co.*, 92 F. Supp. 172 (E.D. Mo. 1949)

In the following F.E.L.A. cases, the motions were denied on the merits although venue in the transferee district would have been proper:

Perry v. *Atchison, T. & S. F. Ry. Co.*, 82 F. Supp. 912 (N.D. Calif. 1948)
Cullinan v. *New York Cent. R. Co.*, 83 F. Supp. 870 (S.D.N.Y. 1948)
Naughton v. *Pennsylvania R. Co.*, 85 F. Supp. 761 (E.D. Pa. 1949)
Belair v. *New York, N. H. & H. R. Co.*, 88 F. Supp. 572 (S.D.N.Y. 1950)
Nagle v. *Penna. R. Co.*, 89 F. Supp. 822 (N.D. Ohio, 1950)
Skultety v. *Pa. R. Co.*, 91 F. Supp. 118 (S.D. N.Y. 1950)

In *Pascarella* v. *New York Cent. R. Co.*, 81 F. Supp. 95 (E.D.N.Y. 1948), the motion was denied because the court held that section 1404(a) did not extend to suits brought pursuant to special venue statutes (Sec. 6 of the Act, 45 U.S.C.A. Sec. 56).

There are many cases other than those arising under the F.E.L.A. In the following the motions to transfer were granted after a finding to the effect that venue in the transferee district would have been proper.

Johnson v. *Baker*, 81 F. Supp. 563 (S.D.N.Y. 1948)
U. S. v. *E. I. duPont de Nemours & Co.*, 83 F. Supp. 233 (D.D.C. 1949)

Banachowski v. *Atlantic Refining Co.*, 84 F. Supp. 444 (S.D.N.Y. 1949)
Cinema Amusements v. *Loew's Inc.*, 85 F. Supp. 319 (D.Del. 1949)
Magnetic Engineer & Mfg. Co. v. *Dings Magnetic Sep. Co.*, 86 F. Supp. 13 (S.D.N.Y. 1949)
U. S. v. *Gerber et al.*, 86 F. Supp. 175 (E.D. Pa. 1949)
U. S. v. *Briggs*, 86 F. Supp. 178 (E.D. Pa. 1949)
Nachtman v. *Jones & Laughlin Steel Corp.*, 90 F. Supp. 739 (D.D.C. 1950)
Henderson v. *Am. Airlines*, 91 F. Supp. 191 (S.D. N.Y. 1950)
St. Paul Fire & Marine Ins. Co. v. *Am. Mail Line, Ltd.*, 94 F. Supp. 28 (S.D. N.Y. 1950)
Crawford v. *Ann Arbor R. Co.*, 94 F. Supp. 29 (S.D. N.Y. 1950)

In the following cases, the motions were denied on the merits. In each case there is a finding that venue would have been proper in the transferee district:

Levenson v. *Little*, 81 F. Supp. 513 (S.D.N.Y. 1949)
Auburn Capitol Theatre Corp. v. *Schine Chain Theatres*, 83 F. Supp. 872 (S.D.N.Y. 1949)
Brown v. *Insurograph*, 85 F. Supp. 328 (D.Del. 1949)
U. S. v. *Scott and Williams*, 88 F. Supp. 531 (S.D.N.Y. 1950)
Wookey v. *Waterman S.S. Corp.*, 89 F. Supp. 909 (S.D. N.Y. 1950)
Lewis v. *American Airlines*, 91 F. Supp. 31 (S.D.N.Y. 1950)
P. Beiersdorf & Co. v. *Duke Laboratories, Inc.*, 92 F. Supp. 287 (S.D.N.Y. 1950)

The following cases are grouped separately because, although transfer is denied in each case on the merits, it is difficult to state from the reports that venue would have been proper in the transferee district.

Barnhart v. *John B. Rogers Producing Co.*, 86 F. Supp. 595 (N.D. Ohio 1949)
U. S. v. *E. I. duPont de Nemours & Co.*, 87 F. Supp. 962 (N.D. Ill. 1950)

Pan American Air v. *Consolidated Vultee Air. Corp.*, 87 F. Supp. 926 (S.D.N.Y. 1949)
Adler v. *McKee*, 92 F. Supp. 613 (S.D.N.Y. 1950)

Two District Court cases are not in point although they discuss Section 1404(a):

Scarmardo v. *Mooring*, 89 F. Supp. 936 (S.D. Tex. 1950)
Latimer v. *S/A Industrias Reunidas F. Matarazzo*, 91 F. Supp. 469 (S.D.N.Y. 1950)

In The

Supreme Court of the United States

October Term, 1950

No. 543

Office-Supreme Court, U.S.
FILED
MAR 15 1951
CHARLES ELMORE CROPLEY
CLERK

THE HONORABLE RICHARD S. BOOREM, UNITED STATES DISTRICT JUDGE, I. B. ADELMAN, and TIVOLI REALTY, INC.,
Petitioners,

v.

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., WARNER BROS. PICTURES, INC., WARNER BROS. PICTURES DISTRIBUTING CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, COLUMBIA PICTURES CORPORATION, UNITED ARTISTS CORPORATION, UNIVERSAL PICTURES COMPANY, INC., UNIVERSAL FILM EXCHANGES, INC., INTERSTATE CIRCUIT, INC., and TEXAS CONSOLIDATED THEATRES, INC.

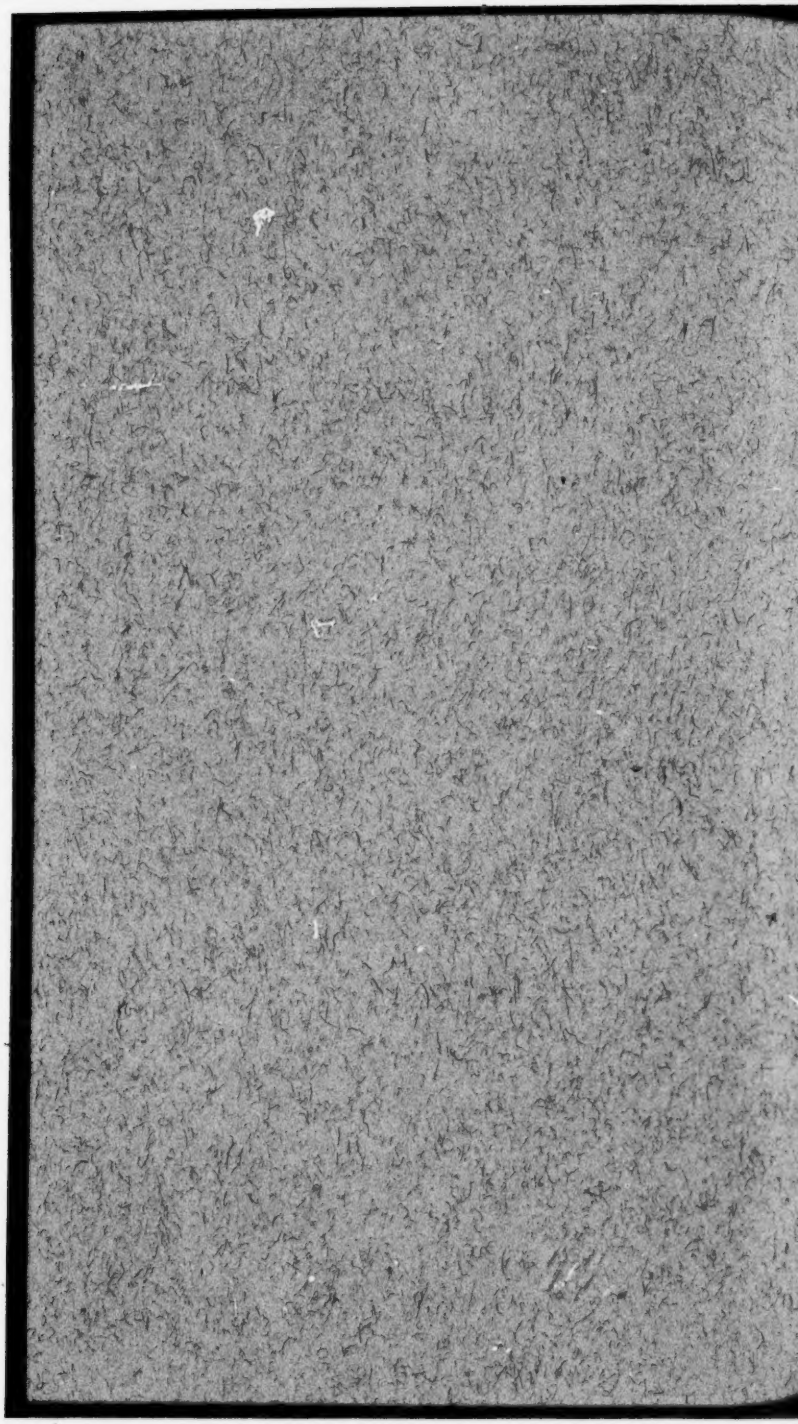
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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In The

Supreme Court of the United States

October Term, 1950

No. 543

The Honorable Richard S. Rodney, United States District Judge, I. B. Adelman, and Tivoli Realty, Inc.,

Petitioners,

v.

Paramount Pictures, Inc., Paramount Film Distributing Corporation, Loew's Incorporated, Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation, Twentieth Century-Fox Film Corporation, Columbia Pictures Corporation, United Artists Corporation, Universal Pictures Company, Inc., Universal Film Exchanges, Inc., Interstate Circuit, Inc., and Texas Consolidated Theatres, Inc.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court is reported at 89 F. Supp. 278. The opinion of the Court of Appeals for the Third Circuit (R. 201) is reported at 186 F. 2d 111.

JURISDICTION.

Petitioners seek to invoke the jurisdiction of this Court under 28 U. S. C. 1254(1).

STATEMENT OF THE CASE.

Petitioners, Tivoli Realty, Inc., a Texas corporation operating a motion picture theatre in Dallas, Texas, and I. B. Adelman, a resident of Texas operating a motion picture theatre in Houston, Texas, instituted separate actions in Delaware under the antitrust laws for treble the damages allegedly sustained by such theatres. The fourteen respondents, being all of the defendants in the two cases, moved (R. 26) to transfer each of the two actions to the United States District Court for the appropriate district in Texas, pursuant to Section 1404(a) of 28 U. S. C., which provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Petitioners opposed the motions, asserting that the district court in Delaware had no power to transfer the actions because (they claimed) five of the fourteen defendants were not inhabitants of Texas and could not be found there and did not transact business there (R. 65). These five defendants had joined with the others in the motions to transfer. There was no question that the other nine defendants were transacting business in Texas, that the plaintiffs transacted their motion picture businesses solely in Texas, and that any damages to the plaintiffs were sustained in Texas.

The district judge adopted petitioners' argument and held that he was without authority to transfer the cases to Texas. He did not consider the merits of the motions or express any opinion as to whether the cases should be

transferred there for the convenience of the parties and witnesses and in the interest of justice.

Respondents applied to the Court of Appeals for the Third Circuit for writs of mandamus directing Judge Rodney to consider the motions on their merits. That Court directed the district court to vacate its order and to consider on the merits, in the light of the convenience of the parties and witnesses and in the interest of justice, whether the causes should be transferred.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The only question before the Court of Appeals was whether the District Court had power to transfer the cases to Texas if such transfer were found to be for the convenience of parties and witnesses and in the interests of justice.

The Court held that power to transfer existed because:

(1) The Texas District Court had *jurisdiction of the subject matter* of these civil antitrust actions. 28 U. S. C. Section 1337.

(2) *Jurisdiction of the person* of all the defendants could have been obtained in the District Court in Texas, since Section 12 of the Clayton Act (15 U. S. C. 22) provides that in civil antitrust actions against corporations, process may be served in any district in which the corporate defendants may be found.

(3) With the Texas court having jurisdiction of the subject matter and the persons of the defendants, the action "might have been brought" in Texas.

The Court of Appeals concluded, therefore, that, since the action might have been brought in Texas and since the defendants' motions waived any possible objection to Texas venue, the Texas forum should be considered an eligible transferee forum by the District Court.

QUESTION PRESENTED.

The only question properly before this Court on the application for certiorari is the correctness of the holding of the Court of Appeals on this issue of power. Properly stated the question should read:

Does a district court have power under Section 1404(a), on motion made by all of the defendants, to transfer an antitrust action to another district court for the convenience of parties and witnesses and in the interests of justice, the transferee forum having jurisdiction of the subject matter and all of the defendants being subject to service of process issued from that court?

In petitioners' statement of "Questions Presented," the first question is incorrectly stated and the second is not in the case. Both are based on the erroneous premise that defendants would not have been amenable to process issued from the Texas court; a premise which, as held by the court below, runs directly counter to Section 12 of the Clayton Act (15 U. S. C. 22), which specifically provides that process may be served on a corporate defendant in any district in which it is an inhabitant, or wherever it may be found.

> *United States* v. *Scophony Corporation,* 333 U. S. 795 (1948).

The third question in petitioners' statement of "Questions Presented" is likewise not before the Court. The decision of the Fifth Circuit in the earlier Tivoli Realty action was held by the Third Circuit to be irrelevant to the issues before it since Section 1404(a) was not in effect at that time. It clearly has no bearing on the question of *power* of the court under Section 1404(a).

REASONS FOR DENYING THE WRIT.

1. The Decision Below Was Correct on the Merits.

The doctrine that venue is a personal privilege which a defendant is free to waive at his option is one of long standing in this Court. *General Intvestment Company* v. *Lake Shore Ry. Co.*, 260 U. S. 261; *Lee* v. *Chesapeake & Ohio Ry. Co.*, 260 U. S. 653; *Neirbo* v. *Bethlehem Corp.*, 308 U. S. 165; *Hoiness* v. *United States*, 335 U. S. 297. If the privilege is not seasonably asserted, it is waived. *United States* v. *Hvoslef*, 237 U. S. 1.

If a defendant fails to appear in the action and assert the privilege, a court having jurisdiction over the subject matter and of the parties may enter judgment against the defendant by default. *Commercial Insurance Co.* v. *Stone Co.*, 278 U. S. 177.

The Adelman and Tivoli suits being based on the antitrust laws, the district courts in Texas clearly had jurisdiction over the subject matter. Under Section 12 of the Clayton Act (15 U. S. C. 22) process issuing from the Texas courts could have been served on the defendants not only in Texas but wherever they could be found. In fact, in the Adelman and Tivoli cases, the ones now before the Court, four of the defendants were served in *New York* with process issued from *Delaware* under this statute.[1]

The distinction between the provision relating to venue contained in Section 12 of the Clayton Act and the provision for obtaining personal jurisdiction by service of process contained in the same section was recently recognized by this Court in two decisions. In *United States* v.

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[1] In the argument made herein respondents have assumed, as did the court below, that five of the defendants were not transacting business in Texas. On this issue, which was controverted below, the Court of Appeals said (Footnote 3): "On the instant record there would seem to be as much basis for a conclusion that the five defendants referred to were transacting business in Texas as for the conclusion that the four New York corporations were transacting business in Delaware. In the view we take of the cases at bar it is unnecessary to determine this fact issue."

National City Lines, Inc., 334 U. S. 573, at 577-78 (1948), the court stated:

> "It is not disputed that the District Court has jurisdiction in the basic sense of power to hear and determine the cause or that it has venue within the provisions of § 12. Nor can it be questioned that any of the defendants can be brought personally within that court's jurisdiction by service of process made in accordance with the provisions of either § 12, or those of § 5 of the Sherman Act."

And, in *United States* v. *Scophony Corporation*, 333 U. S. 795, at 802 (1948) the same distinction was observed:

> "Section 12 of the Clayton Act has two functions, first, to fix the venue for antitrust suits against corporations; second, to determine where process in such suits may be served. Venue may be had 'not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found *or transacts business.*' And all process may be served 'in the district of which it is an inhabitant, or wherever it may be found.' (Emphasis added)"

If the Adelman and Tivoli suits had been filed in Texas and the defendants had been served with process pursuant to Section 12, they would have had to appear and defend to avoid the entry of a default judgment. Where a suit filed in Texas can have such a result, it can hardly be said that it "could not have been brought" there.

Since the defendants would necessarily have had to appear to protect their interests, they would have had the privilege of objecting to, or waiving, venue in the Texas forum. The Court of Appeals held that the same privilege is available for purposes of Section 1404(a). By joining in the motion to transfer, all of the defendants have waived all objection to the Texas venue. There is no reason why such a waiver should be less effective for purposes of Section 1404(a) than if made in a suit originally brought in the Texas forum.

In so construing Section 1404(a), it is submitted that the Court of Appeals was clearly right.

2. The Decision Below is Not in Conflict With the Decision of Any Other Appellate Court.

The cases to which petitioners refer are not in conflict with the decision below.

(a) The first case cited is *Foster-Milburn Co.* v. *Knight*, 181 F. 2d 949 (2nd Cir., May 3, 1950). That was a "diversity" case in which:

(1) the *plaintiff* moved to transfer

(2) to a state where the courts could not have obtained jurisdiction over the person of the defendant.

The defendant corporation there was not subject to service of process in California. Congress not having authorized process in diversity cases to run throughout the country (as it has in the case of corporate defendants in antitrust actions under Section 12 of the Clayton Act), the California courts could not have obtained jurisdiction over the person of the defendant. The Second Circuit held that it was not the purpose of Section 1404(a) to extend the scope of the process of a district court; and that on the plaintiff's motion a case could not be transferred to a court which could not have obtained jurisdiction over the person of a defendant. The case had nothing to do with venue since venue was proper in both forums.

The *Foster-Milburn* case, therefore, has no application to a situation where the motion to transfer is made by all of the *defendants*, and where the defendants could have been summoned in the transferee forum by out-of-state service of process.

That the Second Circuit did not pass upon the question which was before the Third Circuit in the present cases is clear from *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329 (May 8, 1950). In that case one defendant who joined in the motion to transfer was in the same situation as the five defendants in the present cases. The case was decided on grounds not

pertinent here, but in a footnote to the opinion it was stated:

> "Because of the reasons given for our decision, we have not considered whether § 1404(a) authorizes a transfer in these circumstances: Venue as to Sherman Tractor Co., one of the important defendants, does not exist in the Michigan District, but that defendant has joined in the motion for transfer." (p. 332)

If (as petitioners contend) the question had been decided on May 3, 1950, the Court would not have reserved the question in an opinion rendered five days later.

(b) The next case cited by petitioners is *Shapiro* v. *Bonanza Hotel Company,* 185 F. 2d 777 (9th Cir., Dec. 14, 1950). The *Shapiro* case dealt with the identical fact situation presented in the *Foster-Milburn* case. *Plaintiff* moved to transfer a diversity action to a state where personal jurisdiction could not have been obtained over a defendant who *opposed* the transfer. The court held that transfer would not be proper, clearly limiting its decision to the impropriety of transfering an unwilling defendant to a court which could not, by service of process, have obtained personal jurisdiction over it. The court quoted at length from the opinion in the *Foster-Milburn* case and agreed with the interpretation there placed upon Section 1404(a) by the Second Circuit.

(c) Nor is there any merit to the contention that the decision below conflicts with the decision of the Fifth Circuit in *Tivoli Realty, Inc.* v. *Interstate Circuit, Inc.,* 167 F. 2d 155 (1948), cert. den. 334 U. S. 837 (1948). That case was decided before the enactment of Section 1404(a), and had nothing to do with the question of power to transfer pursuant thereto. In that case suit was filed in Texas to enjoin the prosecution in Delaware of the present Tivoli action. The trial court granted the injunction. The Fifth Circuit reversed, holding that, as a matter of comity, one United States District Court should not interfere by injunction with a suit in another Federal District Court where the alleged inequity was based solely on the ground

of inconvenience; and that, in any event, the judicially created doctrine of *forum non conveniens* was not applicable to antitrust cases. The latter view was subsequently adopted by this Court in *United States* v. *National City Lines*, 334 U. S. 573. Since the rule of those cases has been changed by the adoption of Section 1404(a), the court below properly treated the earlier decision of the Fifth Circuit as irrelevant to the issues here presented. See *Ex parte Collett*, 337 U. S. 55; *United States* v. *National City Lines*, 337 U. S. 78. The two decisions are not in conflict.

(d) Similarly, there is no inconsistency between the decision below and the holding, or even the language, of *Gulf Oil Corporation* v. *Gilbert*, 330 U. S. 501 (1947). That case, too, was decided before the enactment of Section 1404(a) and merely held that the action had properly been dismissed under the older judge-made rule of *forum non conveniens*.

(e) While a conflict between the decision of the Third Circuit and the decisions of the district courts, if it existed, would be immaterial on an application for certiorari, the fact is that the district court decisions on the issue here presented are in accord with the holding below.

> *Ferguson* v. *Ford Motor Co.*, 89 F. Supp. 45 (S. D. N. Y., 1950); *Glasfloss Corp.* v. *Owens-Corning Fiberglass Corp.*, 90 F. Supp. 967 (S. D. N. Y., 1950).

Moreover, in *Shore Amusements* v. *Paramount Pictures, et al.* (Civil Action No. 1120-47, District of Columbia, June 15, 1949), Judge Holtzoff transferred an antitrust action from the District of Columbia to Delaware over the objection of two of the defendants that venue in Delaware would have been improper as to them.

3. There is No "Confusion" in the Lower Courts on the Question Decided Below.

Petitioners cite (Brief, p. 11) several lower court decisions in an effort to show that some confusion exists in the

interpretation of Section 1404(a). While some divergence of opinion among the courts may be expected in the interpretation of any new statute, examination of the cases demonstrates that the divergence is not nearly as great as petitioners assert and, further, that there is no conflict whatever among them on the issue decided by the court below and presented by this application.

1. *Magnetic Engineering & Mfg. Co.* v. *Dings Mfg. Co.*, 178 F. 2d 866 (2nd Cir., 1950) is cited as holding that under § 1404(a) "a case cannot be transferred to a district in which defendants are not amenable to process even though the venue is proper." *The case does not so hold.* There plaintiff sued, in New York, a Wisconsin corporation whose factory was located in Milwaukee. On defendant's motion, the trial judge transferred the case to Wisconsin. Defendant was clearly amenable to process in Wisconsin. The Court of Appeals merely held that the order of transfer was not appealable.

2. The following cases are cited for the proposition that "a case cannot be transferred to an improper venue under . . . § 1404(a)". Not one of them so holds.

In *Hampton Theatres, Inc.* v. *Paramount Film Distributing Corp.*, 90 F. Supp. 645 (Dist. of Col., 1950), the court, without making any reference to Section 12 of the Clayton Act, held that the defendants were not doing or transacting business in Virginia and consequently the action could not have been maintained there. The court then assumed arguendo, that the case might properly be transferred and denied the motion to transfer because ". . . it is the decision of this court that the convenience of the parties and a substantial number of witnesses, as well as the interests of justice, would be served by a trial of this action in the jurisdiction of the plaintiff's choice" (p. 647).

Masterpiece Productions, Inc. v. *United Artists Corp.*, 90 F. Supp. 750, 94 F. Supp. 116, (E. D. Pa., 1950), was a diversity case. Plaintiff, a New York corporation, sued

United Artists Corporation, a Delaware corporation, joining Magnus Films, another New York corporation, as involuntary plaintiff. United Artists moved to transfer to New York. If plaintiff had sued in New York, Magnus would have been a defendant, and so the necessary diversity would not have existed. Since United Artists had its principal office in New York (90 F. Supp. 750), obviously *venue* of an action against it would have been proper in New York. The reason the transfer was denied was that the proposed transferee forum lacked diversity *jurisdiction of the subject matter* (90 F. Supp. at 751). On reargument (94 F. Supp. 116) Judge McGranery adhered to this view—properly, it is submitted—but added that in any event the motion on its merits did not make out a fact case for transfer.

United States v. *91 Packages* (D. N. J., 1950, 19 L. W. 2203, was an action *in rem,* and the court correctly held that it could not be transferred to a district where *jurisdiction of the subject matter* could not be obtained. Venue was not involved.

In citing these last cases, petitioners have continued to confuse *jurisdiction* and *venue.* Only by such a confusion of concepts, which signally failed in the Third Circuit, can petitioners hope to make out a case for the granting of certiorari.

3. Petitioners cite (Brief, p. 11) *Ferguson* v. *Ford Motor Co.,* 89 F. Supp. 45 (S. D. N. Y. 1950), as holding that transfer is proper where venue as to one or more defendants is proper in the transferee forum and all defendants, by joining in the motion, waive any question of venue. It does so hold, as does also *Glasfloss Corp.* v. *Owens-Corning Fiberglas Corp.,* cited above. These cases are, of course, in complete harmony with the Third Circuit decision involved here.

4. Petitioners cite as an example of "confusion" *United States* v. *23 Gross Jars,* 86 F. Supp. 824 (N. D. Ohio, 1949). That decision is another case like *91 Packages, supra,*

where transfer to a forum which lacked *jurisdiction* of the *subject matter* was held improper.

5. Finally, petitioners misstate the holding below (Brief, p. 11). It is said that the Third Circuit held that an action "may be transferred to any other district (under § 1404(a)) . . . regardless of venue or amenability to process." Yet one of petitioners' "Specifications of Error" challenges the statement of the Third Circuit "that there was no question of respondents' amenability to process in Texas." (Brief, p. 8).

Thus there is no confusion whatsoever among the cases on the question decided by the Third Circuit now that the erroneous ruling of the District Court in these actions has been corrected by the Court of Appeals. The major confusion in the case is to be found in the failure of petitioners to distinguish between the concepts of *jurisdiction of the subject matter, jurisdiction of the person,* and *venue.* It was the jumbling of these separate concepts, induced by plaintiffs, that led Judge Rodney into error. The clear analysis by the Third Circuit handles the concepts precisely and correctly.

Petitioners' final plea may be described as a sort of spurious class action for plaintiffs generally. But it is clear that the ruling of the Third Circuit does not put plaintiffs, as a class, in any dilemma. The plaintiff is merely subject to the decision of an impartial court as to where the action should be tried. All the cases establish that his choice of forum will be disturbed only on a showing, with the burden on the moving defendant, that trial in the transferee forum will be more convenient for parties and witnesses and in the interests of justice. The argument that this gives the defendant a "choice of the forum" was answered as follows by the court below:

> "On the contrary our decision puts in the hands of an impartial federal tribunal the determination as to where the suits can best be tried."

The decision here recognizes, as Judge Maris has commented elsewhere, that some of the most significant advances accomplished by the Judicial Code of 1948 "are in the direction of the further integration of the federal judicial system" (Preface, 28 U. S. C. A. v). The holding below gives Section 1404(a) the construction which makes it a flexible and effective device for preventing the arbitrary and oppressive selection of an inconvenient forum by the plaintiff, and it vests power to determine the place of trial in the one impartial force in the courtroom; the district judge. The decision is in accord with logic, with precedent, and with the public interest; is not in conflict with any other decision; and furnishes no basis for the grant of certiorari.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

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